ANNIE MAE BUCKLEY

IBLA 79-273 Decided November 20, 1979

Appeal from decision of Montana State Office, Bureau of Land Management, denying reinstatement of oil and gas lease M 26968-P Acq.

Affirmed.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Termination

   An oil and gas lease on which there is no well capable of production terminates by operation of law if the annual rental payment is not actually received by the Bureau of Land Management State Office on or before the anniversary date.

2. Oil and Gas Leases: Reinstatement

   A terminated oil and gas lease may be reinstated only if the failure to make timely payment was either justifiable, i.e., due to events outside the lessee's control, or not due to a lack of reasonable diligence. Reasonable diligence generally requires sending the payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the payment. Mailing rental payment the day before it is due does not constitute reasonable diligence.

3. Oil and Gas Leases: Reinstatement

   The postmark date of a rental payment for an oil and gas lease is generally deemed to be the date of mailing, unless there is satisfactory corroborating evidence to support

the lessee's assertion that the mailing occurred at a date earlier than indicated by the postmark.

APPEARANCES: Annie Mae Buckley, pro se.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

Annie Mae Buckley has appealed from a decision of the Montana State Office, Bureau of Land Management (BLM), denying reinstatement of oil and gas lease M 26968-P Acq., which terminated by operation of law when payment of the annual rental was not received on February 1, 1979, the anniversary date of the lease. 30 U.S.C. § 188(b) (1976). 1/ The payment was not received by BLM until February 2, 1979, arriving in an envelope bearing a January 31, 1979, postmark.

[1] An oil and gas lease on which there is no well capable of production terminates by operation of law if the annual rental payment is not received by the BLM state office on or before the anniversary date. 30 U.S.C. § 188(b) (1976). Appellant suggests that payment should be deemed timely if it was postmarked prior to the due date. However, the applicable regulations make clear that payment must actually be received in the state office on the anniversary date. 43 CFR 3108.2-1(a).

[2] A terminated oil and gas lease may be reinstated only if the failure to make timely payment was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976). Late payment is justifiable if it is attributable to causes beyond the lessee's control. See Daniel Ashley Jenks, 36 IBLA 268 (1978). Reasonable diligence generally requires sending or delivering payment sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal, and delivery of the payment. 43 CFR 3108.2-1(c)(2). Mailing payment the day before it is due does not constitute reasonable diligence. Daniel Ashley Jenks, supra.

[3] Appellant asserts that she actually mailed the payment on January 29, 1979, and that the payment's late delivery to BLM resulted from the Post Office's failure to pick up and process that piece of mail. However, the postmark date of a rental payment is generally deemed to be the date of mailing, unless there is satisfactory corroborating evidence to support the lessee's assertion that the mailing occurred at a date earlier than indicated by the postmark. Daniel Ashley Jenks, supra; David R. Smith, 33 IBLA 63, 66 (1977). One type of satisfactory evidence would include a statement by a postal official explaining the possibility of a delay in processing mail from

1/ Statutory provisions for termination and reinstatement of public land oil and gas leases also apply to oil and gas leases for acquired lands. See 30 U.S.C. § 354 (1976).

a particular location on the day it is asserted mail was deposited in a postal receptacle at that location. Thus, in order to show that the payments were mailed on January 29, appellant would have had to offer some persuasive explanation of why the letter was not also postmarked on January 29, as would normally be expected. See, e.g., Edward Malz, 33 IBLA 22 (1977). Appellant offers no such explanation, and in the absence of such satisfactory corroborating evidence, BLM was correct in regarding the postmark date as the mailing date. Daniel Ashley Jenks, supra; David R. Smith, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Joan B. Thompson
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I concur totally in the decision of Judge Thompson concerning the reinstatement of the terminated oil and gas lease involved herein, I wish to address some of the points raised by Judge Goss in his dissenting opinion.

Judge Goss opines that "it is possible that appellant has a sufficiently substantial interest to be entitled to due process protection." In support of this contention Judge Goss cites the decision of the Ninth Circuit Court of Appeals in Pence v. Kleppe, 529 F.2d 135 (1976), apparently for the proposition that notice and an opportunity for hearing are prerequisite to a denial of reinstatement. When that decision is analyzed in conjunction with the issues presented herein, it is clear that nothing in Pence v. Kleppe, supra, even remotely indicates that due process considerations relating to notice and opportunity for hearing are applicable in the reinstatement of oil and gas leases.

Upon failure of an oil and gas lessee to pay the annual rental on or prior to the anniversary date of the lease, the lease automatically terminates by operation of law. See Act of July 29, 1954, 68 Stat. 585, as amended 30 U.S.C. § 188(b) (1976). No action of the Department occurs in such a situation. The reinstatement of such terminated lease, on the other hand, is a matter clearly vested in the discretion of the Secretary. See Act of May 12, 1970, 84 Stat. 206, 30 U.S.C. § 188(c) (1976). Indeed, the statute declares that such lease may be reinstated only where "it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable diligence on the part of the lessee." Id.

Pence v. Kleppe, supra, involved applications for land under the Native Allotment Act, Act of May 17, 1906, 34 Stat. 197, as amended 43 U.S.C. §§ 270-1 to 270-3 (1970), repealed by Act of December 18, 1971, 85 Stat. 710, 43 U.S.C. § 1617 (1976). Therein, the court held that Alaskan Natives who occupy and use land for at least 5 years, in the manner specified in the Act and regulations, reasonably relied on their continued right to the land. 529 F.2d at 141. The court expressly noted: "There is a clear indication that Congress intended to create or to recognize rights in Alaska Natives to the land that they occupy for the statutory period, and not, as the Secretary contends, merely a hope that the government will give them the land" (Emphasis supplied). 529 F.2d at 141-42.

In contradistinction to the rights of Alaskan Natives, an applicant for reinstatement of a terminated oil and gas lease seeks the favorable exercise of Secretarial discretion. There is not now, nor

has there ever been, a requirement that notice and an opportunity for hearing must be afforded an applicant prior to the exercise of discretionary powers. Indeed, such a requirement would necessitate notice and an opportunity for hearing on virtually every action taken by the Department.

I also take strong exception to the implication of the dissenting opinion that the majority decision is premised on a belief that appellant is making false statements. The provisions of 18 U.S.C. § 1001 (1976) are applicable only where an individual knowingly makes false statements to the United States. It is the nature of memory to cloud after the passage of a relatively short period of time. This is particularly the case where what is involved is a relatively mundane action such as the posting of a letter or payment. Under well-established Board precedent, if appellant actually mailed the payment either the 31st or 30th of January the mailing would not have been timely. See Rosemary Weaver, 30 IBLA 227 (1977); L. J. Arietta, 26 IBLA 188 (1976); William M. Cannon, 20 IBLA 361 (1977). Thus, if appellant's memory is erroneous by only one day the terminated lease could not be reinstated.

It is recognition of these factors which has led the Board to require that an appellant must present other independent evidence to overcome the presumption which arises that the mail was deposited on the day it was postmarked. Indeed, this requirement is necessitated by the Congressional admonition directed to the Department upon the adoption of the Act of May 20, 1970.

> A reinstatement may be made by the Secretary only after he is fully satisfied that the mistake was justifiable or not due to a lack of reasonable diligence on the part of the lessee. The Committee expects the Secretary of the Interior to examine carefully each petition for reinstatement and to adjudicate favorably only those cases where it is clearly shown that the failure was, as indicated above, either justifiable or not due to a lack of reasonable diligence. [Emphasis supplied.]

H.R. Rep. No. 91-1005, reprinted in U.S. Code Cong. & Adm. News at 1453.

I do not understand how this Board can adopt Judge Goss' view and, at the same time, fulfill its obligation to reinstate only those leases where it is clearly shown that the failure to timely pay the rental was justifiable or not due to a lack of reasonable diligence.

Finally, Judge Goss' analogy between the fact situation which exists in the instant appeal, and the situation which arises upon a request for verification of the application of a stamped signature to a drawing entry card (DEC), misses the point completely. No presumption arises from the mere fact that a stamped signature is affixed to a DEC. Thus, when an individual states that the stamped signature was

personally affixed this statement may stand uncontradicted by anything in the record. Where, however, a postmark indicates that the envelope was transmitted on a specific date, it becomes an appellant's burden to overcome a presumption that the letter was not deposited in the mails until the date indicated by the postmark.

Appellant herein recognized the significance of this distinction. Thus, she stated in her statement of reasons for appeal: "As soon as I am well enough to go downtown I will check with the P.O. Dept. to find the reason why [the postmark was not indicative of the date the envelope was mailed] and will let you know." This document was received by the Board on March 12, 1979, but no further submissions were forthcoming.

It is, of course, likely that situations will arise in which an individual will find it impossible to show the actual date of mailing and accordingly will not be afforded reinstatement of a terminated lease. Congress, however, in adopting the Act of May 12, 1970, recognized this likelihood in a different context, noting:

> It is recognized that this 20-day limitation on reinstatements means that a small percentage of terminated leases, otherwise deserving, may not be reinstated under this legislation. However, in balancing the advantage of a more liberal relief provision against the committee's desire to reduce the incentive for "intentional" mistakes, the latter course was chosen. In the event truly deserving cases arise that cannot meet the 20-day provision recourse to private legislation may be necessary.

H.R. Rep. No. 91-1005, supra.

We must recognize that while this Board applies the law in individual cases before it, its precedential decisions have a life of their own. Adoption of Judge Goss' view would ineluctably lead to the result that any petition for reinstatement must be granted wherever an appellant avers that the annual rental was deposited in the mails sufficiently prior to the anniversary date so as to have been received in the normal course of events. Under such a standard it would become impossible to fulfill the review responsibilities which Congress has imposed.

James L. Burski
Administrative Judge

ADMINISTRATIVE JUDGE GOSS DISSENTING:

Appellant has stated she mailed the payment on January 29, 1979. If appellant's statement was knowingly false, she would be subject to a fine of $10,000 and imprisonment of 5 years. 18 U.S.C. § 1001 (1976). Such matters are not to be lightly disposed of. David F. Owen, 31 IBLA 24, 33 (1977) Ritvo, A. J., Dissenting).

It is true that appellant could have been mistaken, but there is no indication thereof in the record, and in thousands of cases daily evidence is taken from interested parties as to recollected dates on which sometimes mundane matters occurred. The postmark "PM, 31 Jan 1979" indicates the payment was mailed then or at some time prior thereto. Whatever presumption should apply to 1979 postal operations, the presumption is in no way conclusive but can be overcome by direct evidence. Although appellant is an interested party, she has submitted direct, positive evidence which should be accorded appropriate consideration. 4 Jones, Evidence, §§ 29.4, 29.10-29.11 (6th Ed. 1972). The uncorroborated statements of interested appellants are regularly accepted by the Board as clearly showing that a complete failure to pay was "justifiable." E.g., Fredres E. Laughbaugh, 24 IBLA 306 (1976). The Board accepts this evidence under the same sentence of the same statute herein concerned, 30 U.S.C. § 188(c) (1976).

Departmental regulation 43 CFR 3108.2-2(c)(2) refers to "normal" delays in collection and transmittal of payments; by clear implication the regulation recognizes that occasional abnormal delays in the mail do occur. There is nothing in the record to indicate that abnormal delay did not occur in this instance, or that appellant's statement is incorrect. No adverse interest of the United States or third party is involved. Cf. 43 CFR 1821.2-2(g). Appellant has made rental payments on the lease since 1974. The lease may or may not be of value and essential to appellant's well being. The Department is not authorized to exercise its discretion in an arbitrary or capricious manner. It is possible a court would find that such an appellant has a sufficiently substantial interest to be entitled to due process protection. See Pence v. Kleppe, 529 F.2d 135 (1976).

If, as alleged, the payment was mailed on January 29 then appellant did allow from Monday until 4:00 p.m. Thursday for transmittal and normal delays. I would accept the Government's taxpayer/former lessee at her word, and hold that she has clearly shown her reasonable diligence. Application of this approach would comport with the interest of economy by avoiding any due process question, and would also be in harmony with the Board's position whereby we also accept without further evidence the statement of offerors to the effect that they personally applied their stamped signature to their offer for an

oil and gas lease. Robert C. Leary, 27 IBLA 296, 301 (1976). Certainly a statement as to an event during a time when an oil/gas lease was in existence, made by a person who has paid rental to the Government, should be accorded at least the weight given to statements by persons who have not entered into such a relationship and whose offer to lease may yet be declined in the Department's discretion.

Joseph W. Goss
Administrative Judge